Supreme Court of the United States

OCTOBER TERM, 1957

No. 84

EMANUEL BROWN,
Petitioner,

against

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

J. BERTRAM WEGMAN,
MYRON L. SHAPIRO,
Counsel for Petitioner,
60 Wall Street,
New York 5, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 356

EMANUEL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

A. Replying to Government's argument on the applicability of the purported immunity statute (Br. in opp., pp. 8-12).

Arguing that the construction of Section 305(d), Motor Carriers Act, urged by petitioner (Pet., p. 35) is not justified, the Government refers (Br. in opp., pp. 10, 11) to the transient, curt legislative history of the section and the amendments to its two clauses.

These committee amendments were offered and adopted without explanation, discussion or debate. These amendments [both adopted simultaneously in time and as one

amendment to one section] contribute no clarification at all of the intent of Section 305(d) insofar as any applicability to a case such as at Bar is concerned.

In the first clause of Section 305(d) the donees of the powers granted are restricted by the language "the commission * * * and joint boards shall have the same power". The amendment to this clause did not limit or expand this grant.

Similarly, between the original text "as are provided in part I" and the adopted words, "as though such matter arose under part I" in the second clause, there is no apparent difference which could be said to bear upon this problem of construction. It is the repetition in the second clause of precisely the words: "any matter under investigation", not the language of the amendment, which confines the statutory proffer of immunity to those who are "subpoenaed or testifying" perforce before the Commission under its power given by the first clause to compel testimony.

At page 12 of its brief in opposition the Government argues that the "judicial gloss on Section 46 was carried forward in Section 305(d)" by the purported incorporation by reference. The "judicial gloss" is of no assistance in determining whether the inclusion in Section 46 of grand juries as bodies able to grant immunity was carried over into Section 305(d). *Shapiro* v. *United States*, (335 U. S. 1, 20) cited by the Government involved the Price Control Act which incorporated Section 46 by reference, but of significance here is that that immunity provision by the terms of its incorporation was limited to the Price Administrator and did not extend to grand juries (Pet. 19, 45, 46). The question involved here was not raised nor considered in the *Shapiro* case.

Nor does this case raise the question of the scope of the grand jury's power to investigate, as implied by the Government (Br. in opp., p. 10); it does put forward the issue of that body's power to grant immunity under a statute such as Section 305(d)—since the grand jury has no inherent power to grant immunity; such power exists only when specifically granted.

B. Replying to subdivision 2 of petitioner's argument as to the adequacy of the immunity (Br. in opp., pp. 12, 13).

Petitioner in subdvision 1 of the argument in his petition for certiorari argues (pp. 21-23) that the language at the very commencement of Section 305(d), "so far as may be necessary for the purposes of this chapter", limits the immunity purportedly granted and makes it inadequate as a substitute for the privilege enshrined in the Constitution.

The Government in its brief in opposition, at page 12, proceeds to answer as though petitioner had argued that the phrase "in connection with any matter under investigation under this chapter" limited the immunity to offenses arising under the chapter.

But that was not petitioner's point, and no answer is suggested by the Government to the argument actually made.

C. Replying to the Government's argument on the propriety of the contempt procedures followed below (Br. in opp., pp. 13-16).

The Government considers that the district judge, on the occasion of the second refusal by a grand jury witness to answer questions theretofore ordered to be answered, may either direct that he be prosecuted on notice under

Rule 42(b), F. R. Crim. P., or exercise an "ancillary power in aid of the grand jury" to make a further order to the witness in open court and before the grand jury to answer questions. The Government says that, if the district court elects the latter procedure and the witness then refuses and states that he will persist in his refusal, the Court may treat this disobedience to the final order in the presence of the Court as a contempt under Rule 42(a).

But the first method of procedure outlined by the Government is the only proper mode which can comply with Due Process and preserve the witness's rights. The other method is inconsistent and in conflict with Mr. Justice Harlan's statement in *Ex Parte Savin*, 131 U. S. 267, 277 of the principles involved here (quoted by petitioner in his petition at page 30); and reaffirmed by Chief Justice Taft in *United States* v. *Cooke*, 267 U. S. 517 (cited by the Government in its brief in opposition at p. 15) at pages 535-537.

In the *Cooke* case, Chief Justice Taft said at page 536:

> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument * * *"

In the footnote on page 15 of its brief in opposition, the Government attempts to argue that *Carlson* v. *United States*, 209 F. 2d 209 (C.A. 1) and *Wong Gim Ying* v. *United States*, 231 F. 2d 776 (C.A., D.C.) are distinguishable, and states that it is not suggested in either case "that, after an initial disobedience to the Court's order to return to the grand jury room and answer the questions, the Court cannot order the witness to answer the questions in open court in the presence of the grand jury

and summarily hold him in contempt on his refusal to obey such final order."

The *Wong Gim Ying* case, *supra,* not only suggests, but clearly states what is to happen if a witness has been returned to the grand jury room and has again improperly refused to answer the specific questions as directed by the judge.

Judge Danaher said at page 780:

> "Had she been so directed, and had she then improperly refused to answer the specific questions pursuant to the judge's ruling that her self-incrimination claim lacked foundation, the next step would have called for prosecution on notice. In that circumstance, she would have received the protection of Rule 42(b).
>
> "The 'failing to testify before the grand jury, as directed' obviously did not occur in the presence of the District judge. He did not see or hear the conduct constituting the contempt. Thus the adoption of the Rule 42(a) procedure was invalid, and it is clear that the requirements of Rule 42(b) were not complied with".

In conclusion, Judge Danaher said at page 780:

> "We will, therefore, remand this case with directions that the Government, if it elects to proceed with this appellant as a witness, accord to her full protection to which she is entitled."

This is the procedure followed in the United States District Court for the District of Columbia,—see *Powell* v. *U. S.,* 226 F. 2d 269 and *Traub* v. *U. S.,* 232 F. 2d 43—and in other circuits—see *Camarota* v. *U. S.,* 111 F. 2d 243 (C.A. 3). *Cf: Paul* v. *U. S.,* 36 F. 2d 639 (C.A. 9).

In *Carlson* v. *U. S.*, 209 F. 2d 209 (C.A. 1), also attempted to be distinguished by the Government in its footnote on page 15 of its brief in opposition, the Court specifically directed itself to the situation involved here, as pointed out at page 27 of the petition, and held that the proceedings must be under Rule 42(b).

The Government also refers to *Hale* v. *Henkel,* 201 U. S. 43, where, however, the criminal contempt proceeding was instituted on presentment and not in the fashion here followed. In *U. S.* v. *Weinberg,* 65 F. 2d 394 (C.A. 2), cited by the Government, it appears that the criminal contempt there was prosecuted on a grand jury presentment.

The Government also refers to *U. S.* v. *Curcio,* 234 F. 2d 470 (C.A. 2) which was reversed by this Court, 354 U. S. 118, on the Fifth Amendment questions presented, rather than on the issue as to the propriety of the procedure, which was similar to that in this case. It cannot be argued by the Government that, by reversing in *Curcio* and affirming in *U. S.* v. *Rogers,* 340 U. S. 367, on the Fifth Amendment questions presented, this Court approved the procedure followed here. It appears also that the Government in *Curcio* (No. 260, October Term, 1956, Br. in opp. to pet. for cert., pp. 16, 17 and fn. 6) advanced a similar contention as to the effect of *U. S.* v. *Rogers, supra* (See Br. in opp. here, p. 13, fn. 4); this Court nevertheless granted certiorari.

With respect to the question as to whether the District Court could compel petitioner to take the stand, the Government's position is contradictory. In support of the summary proceedings under Rule 42(a) followed here, the Government argues that petitioner had ample opportunity to defend himself at every stage, but then it says that petitioner "was not therefore in the status of a defendant until he had again refused to give the answer demanded" (Br. in opp., p. 16).

The Government thus seeks to create a peculiar and anomalous sport in criminal procedure, one ingeniously devised to avoid the constitutional rights of defendants charged with criminal contempts. The grand jury witness, according to the Government, is not a defendant until he, having once more been recalcitrant before a grand jury, despite the Court's direction to answer, commits by repetition under the compulsion of a direct order of the Court, the same contempt before the Court, as before the grand jury, which *instanter* eliminates his right to notice and hearing and all other rights of a criminal defendant; and, thus, only then does he become a defendant, but bereft of all rights, and can be convicted summarily for acts which he could not be compelled by the Court to do, if he were treated as a defendant immediately upon his second return to the Court by the grand jury. *Cf: Matusow* v. *U. S.*, 229 F. 2d 335, 346, 347 (C.A. 5). Due process is not merely eroded by this device; it is obliterated.

It is defiant of reason to argue that petitioner was not a defendant until on his second return to the court room he refused to answer the questions put by Judge Levet. He was returned to the court room because of his then recalcitrance and the Government, knowing of his persistence in his refusal to answer after a specific direction had already been given by the Court, said in effect (47A; 48A), "Put him on the stand; ask him the questions and, if he again refuses to answer, hold him in 'summary contempt under Rule 42(a)' [47A, 48A]". Petitioner was, however, then and there in jeopardy—the objective was his conviction of a crime, inevitably and inexorably. How can it be said that his fundamental rights when in jeopardy in a criminal proceeding did not attach and protect him?

Consider also that the Government by supporting the device here used is conceding, in effect, that, at the point where the Court was about to ask the petitioner whether, if returned to the grand jury room, he would answer the questions, petitioner had acquired the status of a defendant in a criminal proceeding. It follows automatically that this critical question (57A), whether he would answer, if sent back to the grand jury room, could not even then be asked of him by the judge, as petitioner was then being compelled, although a defendant in a criminal proceeding, to testify, when he had an absolute right not to take the stand or testify.

Of course, the fact is that petitioner's right not to take the stand attached from the moment that he was returned to the courtroom for the second time by the grand jury, but even the concession here made by the Government voids his conviction.*

D. Replying to the Government's argument on the question of the sentence (Br. in opp., pp. 16-18).

To demonstrate that the sentence was not extraordinary in severity, the Government refers to certain cases, none of which is comparable to the instant case.

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* In footnote 6 at page 16 of its brief in opposition, the Government deals with the question of the secrecy of the proceedings (Pet., p. 3). Implicit in its discussion is the contention that the proceedings on April 8, 1957 were open. While the record does not show that the courtroom was cleared on that day by the Court (46A, 47A), that it was, cannot factually be disputed and the Court of Appeals assumed such fact (Pet., pp. 64, 65). It should be noted also that the prosecutor on April 5, 1957 said to the Court (7A), that it is the procedure that the courtroom be cleared.

The right to a public trial being so fundamental, the infringement thereof cannot, it is respectfully submitted, be overlooked on appeal or in this Court, because of counsel's failure to raise it in the trial court.

In *Hill* v. *United States, ex rel. Weiner,* 300 U. S. 105, the contempt involved was the violation of a decree in an anti-trust suit. In *Lopiparo* v. *United States,* 216 F. 2d 87 there was involved the credibility and good faith of a witness who testified that he was unable to find certain books he was ordered to produce. *Warring* v. *Huff,* 122 F. 2d 641 concerned, as shown by the companion case *Warring* v. *Colpoys,* 122 F. 2d 642, the use of money to influence a prospective juror. *Conley* v. *United States,* 59 F. 2d 929 arose out of an attempt to "fix" a criminal case and to procure its dismissal for a consideration. *United States* v. *Lederer,* 140 F. 2d 136 was a violation of an injunction restraining the defendant from selling meat at prices in excess of the O.P.A. maximum price regulation. *Creekmore* v. *United States,* 237 F. 743 involved an attempt to corrupt a trial juror.

The Government's position that, although certiorari has been granted in *United States* v. *Green* on the question of validity of a sentence in excess of one year for criminal contempt, it should not be allowed here on the same question, is manifestly unfair. *Cf: Costello* v. *U. S.,* Oct., 1956 Term, No. 666, 1 L. ed. 2d 591. As there are other questions in the *Green* case, on which this Court might very well decide that case, petitioner would thereby be deprived of his right to be heard on that point in this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, a writ of certiorari should be allowed.

Respectfully submitted,

J. Bertram Wegman and
Myron L. Shapiro,
Counsel for Petitioner.